United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2109

To be argued by
THEODORE H. KATZ

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -X

RAYMOND GILLIARD, FRANCIS BLOETH and JOHN SUGGS,

Plaintiffs-Appellees,

-against-

RUSSELL G. OSWALD, Commissioner of Correctional Services and J. EDWIN LaVALLEE, Superintendent of Clinton Correctional Facility,

Defendants-Appellants.

No. 76-2109

- -X

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P/S

BRIEF FOR PLAINTIFFS-APPELLEES

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BRIEF FOR PLAINTIFFS-APPELLEES

QUESTIONS PRESENTED

1. Whether the district court properly held that plaintiffs' rights to due process of law under the Fourteenth Amendment were violated where no emergency situation existed at Clinton Correctional Facility which justified their confinement in segregation for approximately five (5) weeks without being afforded notice of any charges and an opportunity to be heard?

2. Whether the district court, having found the defendants to be personally aware of the deprivations suffered by plaintiffs and to have participated in the denial of minimal due process procedures, including denial of the benefit of defendants'

own procedural rules, properly held defendants liable for the damages necessary to compensate plaintiffs for the losses which they suffered?

STATEMENT OF THE CASE

This is an appeal from an order and judgment of the United States District Court for the Northern District of New York (Port, J.), dated July 22, 1976, which granted plaintiffs monetary damages in the following amounts: $715.00 in favor of plaintiff Gilliard; $748.25 in favor of plaintiff Bloeth; and $740.00 in favor of plaintiff Suggs.

This civil rights action, brought pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343, was commenced in May of 1973 by plaintiffs who, at the time their claim arose, were inmates at Clinton Correctional Facility, Dannemora, New York, serving sentences imposed by New York State courts.* The complaint (15a-22a)** charged that plaintiffs had been arbitrarily removed from the general population of Clinton Correctional Facility and had been housed in segregated units for approximately five weeks where they suffered substantial deprivations and were

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* At the time they filed their complaint, plaintiffs were incarcerated at the Adirondack Correctional Treatment and Evaluation Center, Dannemora, New York.

** Unless noted otherwise, numbers in parentheses followed by "a" refer to pages of the appendix to defendants-appellants' brief. Plaintiffs-appellees have filed a separate appendix. See n.1, p.5 infra.

subjected to punitive conditions similar to those imposed on inmates who had been found guilty of serious infractions of prison rules. Plaintiffs complained that at no time prior to or during their confinement in segregation were they given notice of charges, an opportunity to be heard, or any reason for their segregation, in violation of their Fourteenth Amendment rights. Compensatory and punitive damages were sought for their unconstitutional confinement and loss of wages.

The trial in the court below took place on April 7 and 8, 1975, before Judge Port. Plaintiffs Gilliard, Bloeth and Suggs each testified on their own behalf and introduced three exhibits in evidence. Defendants did not testify at trial but called one witness, William Gard, Deputy Superintendent in Charge of Security at Clinton, and introduced a number of exhibits in evidence.

On July 22, 1976, the district court rendered its decision and issued an order and judgment (3a-11a). Judge Port concluded that plaintiffs had been segregated first in a special housing unit and then in a disciplinary housing unit, in both of which they were deprived of most of the rights and privileges they had been afforded while in the general population (3a-5a). They thus suffered substantial deprivations, constitutionally entitling them to minimal procedural due process (6a). Their

rights to due process of the law were violated because at no time were any of the plaintiffs informed of any specific charges against them, nor were they given a hearing at which they could challenge their confinement; furthermore, they were never told how long they would have to remain in segregation (4a,5a,6a,7a). Moreover, the court found that defendants failed to follow their own procedural rules for effectuating inmate segregation in special housing units (8a).

Judge Port found that no state of emergency existed at Clinton Correctional Facility which justified plaintiffs' summary confinement or continued confinement without due process safeguards (5a,6a), and that defendants Oswald and LaVallee were aware of plaintiffs' conditions of confinement and personally participated in the treatment accorded them (6a). The court held, therefore, that plaintiffs were entitled to recover compensatory damages to redress their unconstitutional confinement (7a), and it entered judgment in the amount of $715.00 in favor of plaintiff Gilliard; $748.25 in favor of plaintiff Bloeth; and $740.00 in favor of plaintiff Suggs. Judge Port denied the award of punitive damages, finding that defendants' improper conduct was not part of a pattern of such behavior and that similar circumstances were unlikely to arise in the future (6a).

On September 27, 1976, the district court stayed the execution of its final judgment pending the outcome of this

appeal and on the condition, which was satisfied, that appellants file a supersedeas bond in accordance with Rule 62(d) of the Federal Rules of Civil Procedure.

STATEMENT OF FACTS

Background - February 15-20, 1973

On February 15, 1973, as a result of a number of assaults upon inmates at the Clinton Correctional Facility, Superintendent LaVallee ordered that the inmate population be locked in their cells (4a, PA104-105).* At the trial, each of the plaintiffs denied personal knowledge of or participation in the assaults (PA11,47-48,69) and defendants conceded that there was no evidence suggesting that plaintiffs were in any way involved (PA163). Judge Port concluded that plaintiffs were in fact not involved in the assaults of February 15th (5a).

From the 15th through the 19th of February,** programs in the institution ceased and the entire prison population was confined to cells twenty-four hours a day so that a search for

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* Numbers in parentheses preceded by "PA", refer to pages of the appendix to plaintiffs-appellees' brief. Plaintiffs' appendix consists of the transcript of the trial below and portions of plaintiffs' Exhibit 3, the deposition of Superintendent LaVallee in Ray v. Rockefeller, 71 Civ. 488 (N.D.N.Y.), March 22, 1973.

A joint appendix was not submitted in this appeal, pursuant to Rule 30, F.R.App.P., because appellants never consulted appellees as to the contents of their appendix. Appellees have submitted an appendix containing material they believe to be essential to the Court in rendering its decision.

** Plaintiffs did not claim damages for the events that occurred during this period of time.

weapons could be undertaken (3a, PA 107-108).* The entire facility, including every cell, was subjected to a complete "shake down" and each inmate was subjected to a body search (PA 12,48-49,70,108,143). As a result of the search, a large number of weapons and other items of contraband were discovered (PA 146, Defendants' Exhibits A-G) and, accordingly, various inmates were subjected to disciplinary action (PA 119). Defendants admitted, and the district court found, that no weapons or items of contraband were discovered on plaintiffs' persons or in their cells and none were otherwise attributed to them (5a, PA 147-148).

By February 19, 1973, the search of the inmates, their cells and portions of the institution had been completed (PA 144),** and most of the inmates, including plaintiffs, were released from their cells and were permitted to go to the mess hall, the recreation yard and to their jobs (PA 13,49,71,145). Deputy Superintendent Gard conceded that due to the recovery of large amounts of contraband the institution was substantially safer than it had been prior to the February 15th incidents (PA 152).

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* A small number of prisoners, however, including Mr. Bloeth, were immediately screened and permitted to continue their jobs so that essential services could be maintained (PA 11,107). As Deputy Superintendent Gard indicated, these were the men that the prison administration "had the most confidence in" (PA 161).

** Mr. Gard testified that a search of some portions of the institution, which were inaccessible to the released inmates, continued for another five to nine days (PA 144-145).

On February 20th, Superintendent LaVallee, in an announcement to the inmate population, stated:

> . . .we are returning to normal as rapidly as possible. . .
> On Wednesday, the 21, we will be as near normal as possible in terms of the search. Most shops and work areas will be open. The yard will operate normally and we will continue our investigation (Defendants' Exhibit H, 28a).

Two days later, in a letter to Commissioner Oswald, Superintendent LaVallee stated:

> Starting on Monday, programs were gradually resumed and it is anticipated that with some exceptions, normal activity will resume on Thursday (Defendants' Exhibit I, 30a).

In depositions taken in another action on March 22, 1973, and introduced in evidence at the trial below, Deputy Superintendent Gard and Superintendent LaVallee readily admitted that no emergency had existed at Clinton since at least February 20, 1973 (PA 190-192 and Plaintiffs' Exhibit 3, PA 221-222).* Judge Port concluded that no emergency situation existed at Clinton on or after February 23, 1973 (7a,8a).

Nevertheless, shortly after the shutdown of the facility had been concluded, on February 19th or 20th, plaintiffs Gilliard, Bloeth and Suggs were individually informed by correction officers that they had been placed under keeplock, i.e.,

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* Indeed, defendant LaVallee testified in his sworn deposition that at no time during the past year had he declared a state of emergency at Clinton (Plaintiffs' Exhibit 3, PA 221).

confinement to their cells twenty-four hours a day. None was informed at this time why this action had been taken (PA 13, 49, 71).*

Plaintiffs' Confinement In Segregation

A. Confinement in E Block

The district court found that on or about February 23, 1973,** in the absence of a state of emergency (7a), plaintiffs were removed from their cells and were summarily segregated in E Block, which had been converted into a special housing unit by Clinton officials (5a, PA 130-131).***

The only information plaintiffs received regarding their confinement in E Block was a form notice from Superintendent

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* In an announcement to the population via institutional radio on February 20, 1973, Superintendent LaVallee stated that although institutional operations were near normal, some people would be keeplocked, either because there was definite proof that they were involved in the disturbance of February 15th or because they were under investigation (Defendants' Exhibit H, 28a). In a list accompanying a memorandum dated February 22, 1973, sent by Superintendent LaVallee to Commissioner Oswald, plaintiffs were included among forty-seven inmates who had been keeplocked for purposes of investigation and not on specific misbehavior reports (Defendants' Exhibit I, 32a).

** Although uncertain of the exact day they were placed in E Block, Mr. Bloeth and Mr. Gilliard believed it was February 20th (PA 14, 72).

*** Mr. Suggs, who was already in E Block at that time, testified that once it was declared a special housing unit, many inmates were transferred out and the conditions became substantially more restrictive (PA 49-50).

LaVallee, distributed on February 23, 1973, indicating that they were being placed in keeplock as a result of the disturbance of February 15th and that their case would be reviewed with "deliberate speed" (Plaintiffs' Exhibit 1, 23a).

Although each of the plaintiffs sought more specific information regarding his confinement, they were not able to speak to any correctional official concerning the matter (PA 18,52,75-76). Indeed, Mr. Bloeth, who on one occasion was aware that defendants LaVallee and Oswald were touring E Block, specifically requested to speak to them but they refused (PA 18,41).

Judge Port found that at no time during their three week confinement in E Block, were any of the plaintiffs informed of any specific charges against them or why they were the subject of investigation. Moreover, at no time were they given a hearing at which they could challenge their segregation (6a).

In E Block, plaintiffs were deprived of most of the rights and privileges they had enjoyed in general population (4a-6a). The court below found, in detail, that while in general population plaintiffs were able to participate in a variety of educational, vocational, religious and recreational programs and they enjoyed a number of other rights and privileges (4a). Each was permitted out of his cell for most of the

daylight hours and could freely intermingle with other inmates (PA 10,46,66).

While in the general population, Mr. Bloeth was employed (PA 9-10), and Mr. Suggs and Mr. Gilliard, although briefly unemployed, were awaiting placement on new jobs (PA 46-47, 68,88) and were receiving unemployment pay (12a). Each had access for substantial periods each day to a huge outdoor yard where they could engage in various sports and other recreational activities (PA 45,66,89). Plaintiffs were enrolled in classes (PA 10,68), had full commissary privileges (PA 10,46,66), and were able to attend religious services and entertainment events (PA 10,45,46,66,67). Mr. Bloeth was permitted to cook his own meals (PA 9), and plaintiffs Gilliard and Suggs ate in the prison mess hall. They lived in fully furnished cells (PA 9) in which they were permitted to have all of their personal property (PA 9,46,68).

In comparison, once confined to E Block plaintiffs experienced a severe loss of rights, as detailed fully by Judge Port (5a-6a). Plaintiffs were restricted to E Block and were not permitted to have any contact with inmates in general population (PA 16,50,71,74).* They were confined to their cells at least twenty-three hours a day (PA 51,73) and

* On one occasion Mr. Suggs attempted to have a conversation with the inmate porter assigned to feeding E Block inmates. However, correction officers stopped the conversation and the porter subsequently lost his job and was placed in keeplock (PA 50).

were allowed out only for one hour of exercise in the small enclosed E Block yard where no recreational activities were possible (PA 15-16,50,71). They were not permitted access to the mess hall but instead ate their meals in their cells (PA 15,50,73) where all meals were served cold (PA 15,50). They were permitted only one fifteen minute period a week to both shower and wash their clothes (PA 16). Restrictions were placed on the personal property they could keep in their cells (PA 16, 74-75).

No vocational, religious, entertainment, or educational programs were available to plaintiffs while they were in E Block. They could not hold jobs and receive wages (PA 51, 74). They could not attend religious services (PA 16,50-51, 74). They were not permitted to attend movies or any of the other entertainment regularly offered at the institution (PA 16,74). Finally, Mr. Bloeth and Mr. Gilliard were not permitted to continue to participate in the courses in which they were enrolled (PA 16,74).

B. Unit 14 Segregation

The district court found that on or about March 12, 1973, without explanation, plaintiffs were removed to Unit 14,* the disciplinary housing unit at Clinton Correctional Facility, normally used to confine those inmates found guilty of serious

* Plaintiff Gilliard testified at trial that he believed that he was transferred to Unit 14 on March 14th or 15th (PA 84,87).

violations of institutional rules (6a, PA 19,52-53,180-181).* Judge Port made detailed findings indicating that in Unit 14 plaintiffs were forced to endure even more restrictive conditions than they had experienced in E Block (6a-7a).

As described by Mr. Bloeth, Unit 14 is "total isolation and total segregation" (PA 20). While in Unit 14 plaintiffs were continuously confined in their cells and were not permitted to engage in any program or activity which would allow them to commingle or have visual contact with inmates in the general population, or even with other inmates in the unit itself (PA 23, 56; see also, 7 N.Y.C.R.R. §300.2(b) and (c)). Indeed, Mr. Bloeth and Mr. Suggs testified that they never saw another inmate during their confinement in Unit 14 (PA 23-24,56).

Although plaintiffs Bloeth and Suggs were permitted a brief exercise period in the small Unit 14 yard, conditions surrounding that exercise period were so intimidating that they were discouraged from using it. Specifically, they were required to undergo a strip search before and after the exercise period and then once in the exercise area they were forced to keep moving by correction officers who stood nearby with tear gas guns (PA 24,56). Furthermore, exercise was

* Defendants admitted that Unit 14 was used as punishment and inmates who were placed there for disciplinary reasons, for protection or prior to transfer were all treated the same. (Plaintiffs' Exhibit 3, PA 225-226).

not permitted in groups but instead only one inmate was permitted to go to the yard at a time (PA 24). As a result of these intimidating conditions Mr. Bloeth stopped going to the Unit 14 yard after the second or third day, and Mr. Suggs after the first day (PA 24,56). Mr. Gilliard testified that he was not permitted access to the exercise area at any time during his confinement in Unit 14 (PA 79).

While in Unit 14 plaintiffs were subjected to stringent security measures far exceeding those taken in general population and E Block. Correction officers in the unit carried long clubs similar to axe handles (PA 22-23) and plaintiffs were subjected to frequent strip searches (PA 24,54,79) and tear gassing (PA 25). Mr. Suggs testified that during the period he was in the unit he was directly tear gassed by an officer for failing to stand at the cell bars for the count, even though the standing count rule was no longer in effect (PA 56-57).

In Unit 14 plaintiffs were confined to cells that were furnished with nothing more than a metal bed, a mattress, and a combination toilet-sink unit (PA 55,78). Mr. Gilliard termed the cells in the unit "filthy" (PA 78). Plaintiffs' personal possessions were limited (PA 23,54-55,78-79), and they could not purchase any items from the Clinton commissary (PA 23). Both the clothing and the bedding they were issued were ragged and torn (PA 54-55,78). Mr. Suggs, a Sunni Muslim,

was not permitted to wear the skull cap which is worn by members of his faith (PA 55).

Although plaintiffs continued to seek the reasons for their segregated confinement, they were wholly unsuccessful. Mr. Suggs, who asked a correction officer why he was in the unit, was told, "Sorry, we don't know what the story is on you. You are just here on administrative keeplock" (PA 54). At one point Mr. Bloeth demanded a hearing from prison officials and was finally taken before a panel of three correction officers. He described what occurred:

> . . .they asked me first, what do I want? Then I told them I want to know why I am in Unit 14, and they looked at my disciplinary card and they said, "Well, as far as the disciplinary card is concerned, you are not in Unit 14. So apparently it is the Superintendent's orders, and I will let you know what the results are when I go out" (PA 21).

Mr. Bloeth added that he never heard anything more from any members of the panel (PA 21).*

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* On another occasion Mr. Bloeth observed Deputy Commissioner William Quick of the Department of Correctional Services touring the unit, and asked him if he knew why he was in Unit 14. At trial Mr. Bloeth recalled their conversation:

> [H]e asked me where I was before I came to Clinton, and I told him at Green Haven, and he asked me where I was before Green Haven, and I told him Attica, and he asked me where I was before Attica, and I told him Clinton, and he said "That is why you are in Unit 14", and walked away (PA 22).

Plaintiffs remained in Unit 14 approximately two weeks at which time they were transferred out of the Clinton Facility. Mr. Gilliard was transferred out on March 27, 1973; plaintiffs Bloeth and Suggs on March 28, 1973 (7a).

The court below found that at no time during their confinement in Unit 14 were any of the plaintiffs informed of any specific charges against them nor were they given a hearing at which they could challenge their confinement. They were never informed as to how long they would remain in Unit 14 (7a, PA 21,54,77).

Throughout the period of plaintiffs' segregation, the Adjustment Committee and Superintendent's Committee* of the institution were functioning. (Plaintiffs' Exhibit 3, PA 227-228). Judge Port concluded that "[n]o continuing state of emergency existed at the Clinton Correctional Facility from February 23, 1973 to late March 1973 which justified plaintiffs' summary confinement in special housing units" (7a).

Plaintiffs' prolonged confinement in segregation, without knowing either the reasons for that confinement or its duration, clearly caused them grave depression and mental stress (PA 58,80). In addition, although the court below limited plaintiffs' testimony as to the ongoing effect of the events of February and March 1973 (PA 80-81), they testified that these events continued to have an adverse effect on their chances for parole and aggravated their relationships with correctional staff (PA 26-27,58,80-81).

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* These bodies preside over disciplinary hearings in New York State prisons. Powell v. Ward, ___F.2d___ No.75-2107 (2d Cir. September 17, 1976) aff'g 392 F. Supp. 628 (S.D.N.Y. 1975).

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY HELD THAT PLAINTIFFS' DUE PROCESS RIGHTS WERE VIOLATED WHERE, IN THE ABSENCE OF AN EMERGENCY SITUATION, PLAINTIFFS WERE CONFINED IN SEGREGATION FOR APPROXIMATELY FIVE (5) WEEKS WITHOUT BEING AFFORDED NOTICE OF ANY CHARGES, AN OPPORTUNITY TO BE HEARD OR NOTIFICATION OF THE REASONS FOR SUCH CONFINEMENT.

Introduction

At the outset, it is important to note that defendants do not seriously challenge the district court's conclusion that plaintiffs, while confined in segregation for approximately five weeks, experienced substantial deprivations. Nor do they dispute the court's determination that plaintiffs were denied even the most minimal due process safeguards during the entire period of their segregation. Rather, defendants challenge Judge Port's finding that no emergency situation existed at Clinton on or after February 23, 1973, which justified plaintiffs' extended segregation in the absence of due process.

Plaintiffs will demonstrate that Judge Port, having heard the testimony and considered the evidence, rendered a decision fully supported by the record and consistent with controlling case law. Defendants, in attempting to evade the clear evidence, including their own admissions that no emergency existed at the time in issue, invoke such talismanic

phrases as "emergency", "discretion", "security" and "administrative necessity". It will be shown that these concepts, which might in other circumstances be compelling, ring hollow in the context of the record below.

A. The Denial of Due Process

It is well established that "a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no Iron Curtain between the Constitution and the prisons of this country." Wolff v. McDonnell, 418 U.S. 539 (1974). Prisoners, although necessarily subject to a retraction of the rights enjoyed by ordinary citizens, are entitled to protection from arbitrary, capricious or discriminatory treatment. Accordingly, courts have vigorously afforded them the safeguards of the Due Process Clause where, as a result of actions by prison officials, they may suffer "grievous loss" or "substantial deprivations". Wolff v. McDonnell, supra; Powell v. Ward, _____ F.2d _____, No. 75-2107 (2d Cir. September 17, 1976), aff'g 392 F.Supp. 628 (S. D.N.Y. 1975); U.S. ex rel. Larkins v. Oswald, 510 F.2d 583 (2d Cir. 1975); Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971) (en banc), cert. denied sub nom., Sostre v. Oswald, 404 U.S. 1049 (1972); Morris v. Travisano, 509 F.2d 1358 (1st Cir. 1975); Gray v. Creamer, 465 F.2d 179 (3d Cir. 1972).

In Sostre v. McGinnis, supra, the governing precedent in the instant case,* this Court outlined the basic test for determining the extent to which procedural safeguards are required in the prison setting. The Court held:

> If substantial deprivations are to be visited upon a prisoner, it is wise that such actions should at least be premised on facts rationally determined. This is not a concept without meaning. In most cases it would probably be difficult to find an inquiry minimally fair and rational unless the prisoner were confronted with the accusation, informed of the evidence against him, and afforded a reasonable opportunity to explain his actions (citations omitted). 442 F.2d at 198.

It has been widely recognized that, as in Sostre, confinement to segregation is a substantial deprivation, entitling an inmate to minimal due process. See Powell v. Ward, supra; U.S. ex rel Larkins v. Oswald, supra; Gray v. Creamer, supra; U.S. ex rel. Miller v. Twomey, 479 F.2d 701 (7th Cir. 1973); U.S. ex rel. Robinson v. Mancusi, 340 F.Supp. 662 (W.D.N.Y. 1972); Carter v. McGinnis, 320 F.Supp. 1092 (W.D.N.Y. 1970).**

* In Wolff v. McDonnell, supra, the Supreme Court set forth the procedural safeguards which must be accorded inmates at prison disciplinary proceedings which involve major changes in the conditions or terms of confinement. Since Wolff was specifically held to be nonretroactive, 418 U.S. at 574, and the cause of action in the instant case arose prior to Wolff, Sostre was the controlling case law and must be applied here. Williams v. Vincent, 508 F.2d 541, 545 (2d Cir. 1974); U.S. ex rel. Larkins v. Oswald, supra, 510 F.2d at 587; Bloeth v. Montanye, 514 F.2d 1192, 1194 (2d Cir. 1975).

** This Court's holding in U.S. ex rel. Walker v. Mancusi, 467 F.2d 51 (2d Cir. 1972), aff'g 338 F.Supp. 311 (W.D.N.Y. 1971), is not to the contrary, and it has clearly been misconstrued by defendants. In that case the petitioners had been confined to

(fn. cont'd next page)

Defendants do not seriously argue otherwise.*

In the instant case, although subjected to severe deprivations in segregation for over five weeks, plaintiffs were not afforded any of the safeguards required by Sostre.** Judge Port concluded that plaintiffs were confined in segregated housing,

> . . .without minimal due process of any kind. They were not given the reasons for such confinement, they were not charged with any violations; they were not afforded even the most informal opportunity for any denial of wrongdoing or to request a return to general population with its attendant benefits (8a-9a).

Defendants do not challenge that conclusion.

(fn. cont'd)
a special housing unit at Attica Correctional Facility where they were deprived of certain privileges enjoyed by the general population. While refusing to find that the conditions they endured were so barbarous as to constitute cruel and unusual punishment, the Court did affirm the lower court's holding that the conditions endured were sufficiently severe to require minimum due process safeguards. Id. at 53-54. It is noteworthy that the petitioners in Walker appear to have enjoyed substantially greater privileges than were afforded plaintiffs in the instant case.

* In the one brief passage in which they indirectly raise the issue (Defendants' Brief at 26), defendants find it necessary to distort and ignore the substantial deprivations which plaintiffs suffered in segregation, as recognized and thoroughly enumerated by the district court. Among those were confinement to cells at least twenty-three hours a day; no opportunity to work or participate in any institutional activities; denial of contact with other inmates; extremely limited time for exercise under inhospitable conditions; eating in cells; strip searches and tear gassings; and denial of most of their personal property (5a-7a).

** Judge Port also found that defendants failed to employ the procedural safeguards embodied in their own rules and regulations (9a-10a). See pp. 23-24, infra.

B. Absence of an Emergency Justification

(1)

Defendants contend that following the four or five inmate assaults of February 15th, a six week emergency situation prevailed at Clinton during which it was necessary to segregate and investigate plaintiffs in the absence of any due process protections. They thus challenge Judge Port's finding that no emergency existed after February 23, 1973, which justified plaintiffs' summary segregation.

In order to succeed in their challenge defendants must establish that Judge Port's finding was "clearly erroneous". F.R.Civ.P. 52(a). That endeavor must fail, for the record fully supports the district court's conclusion that circumstances at Clinton were such that the requirements of Sostre should have been satisfied. In reaching his conclusion, Judge Port did not have to "second guess" the defendants or apply "hindsight judgment"; the record demonstrated that defendants themselves did not believe an emergency situation to have existed during that six week period.

Initially, it should be noted that the court below did not challenge defendants' discretion in dealing with the assault incidents of February 15, 1973.* It acknowledged Superintendent LaVallee's emergency authority (4a-5a) and did not make any findings of constitutional deprivation during the

* Plaintiffs, as well, did not seek damages for their initial keeplock, although they were uninvolved in the precipitating incidents.

eight day period subsequent to the initial lockup. However, Judge Port did conclude that "[n]o continuing state of emergency existed at the Clinton Correctional Facility from February 23, 1973 to late March 1973 which justified plaintiffs' summary confinement in special housing units" (7a-8a). There is more than ample support in the record for that finding.

Most significantly, defendants' claim of a continuing emergency is in direct conflict with the sworn testimony of Deputy Superintendent Gard and defendant LaVallee, taken at depositions on March 22, 1973, during the very period that plaintiffs were confined in Unit 14. Both Mr. Gard and Mr. LaVallee readily admitted that no emergency had existed at Clinton since at least February 20, 1973 (PA 190-192). Indeed, defendant LaVallee testified in his deposition that at no time during the past year had he declared a state of emergency at Clinton or otherwise informed his superiors in Albany that an emergency situation existed (Plaintiffs' Exhibit 3, PA 221-222). Although these prior statements were strikingly inconsistent with Mr. Gard's testimony at trial, defendants made no attempt to reconcile or otherwise account for them.

Other evidence produced at trial indicated that defendants' claim of a continuing emergency is without any factual basis whatsoever. On February 19, 1973, the search of the inmates and their cells had been completed and the shutdown of the institution had ended (PA 144). Recreation, messhall and jobs were resumed (PA 13,49,71,145). Deputy Superintendent

Gard testified that at that time the institution was in a much safer position than it had been prior to February 15, 1973 (PA 152).

In his announcement to the population, on February 20th, Superintendent LaVallee indicated that things were "returning to normal" and that by the 21st of February, most shops, work areas and the yard would be open and operating normally. (Defendants' Exhibit H, 28a). In a letter to defendant Oswald, Superintendent LaVallee indicated that programs were resumed on February 19th and normal activity would resume on the 22nd of February (Defendants' Exhibit I, 30a). Finally, in a followup letter to Deputy Commissioner Quick, dated March 2, 1973, he provided a list of those inmates who had been transferred or were still in segregated housing, with no mention made of emergency conditions at the institution.

It is apparent that Judge Port's finding of no emergency is amply supported by the record and, therefore, is not clearly erroneous. It is evident that Clinton Correctional Facility was not experiencing a situation of escalating violence or tension, rather, a fairly swift return to normal operations was effectuated. Plaintiffs were removed to segregation units on or before February 23, after the institution had returned to normal. Nevertheless, for the next five weeks, they were subjected to increased punishment and deprivations

without being afforded any of the procedural safeguards required by Sostre.*

(2)

Assuming, arguendo, that an emergency did exist at Clinton throughout February and March of 1973, the court below properly concluded that defendants also exceeded their authority under their own rules and regulations,** by confining plaintiffs to E Block and Unit 14 during that period (8a,9a-10a). Section 251.6(f) of the Department of Correctional Services' own rules, which limits the powers of prison officials in emergency situations,*** was exceeded in two respects. Pursuant to that

* Defendants' concern with the protection and rights of the majority of inmates, see Defendants' Brief at 20-21, merits only cursory comment. It is totally specious to suggest that the protection of the inmate population required the denial of due process rights to plaintiffs. One wonders how the provision of notice and a hearing to plaintiffs during their five weeks of segregation would have endangered the safety of others. Even where an individual is confined because of legitimate concerns with security and safety, he may not be deprived of the rudiments of due process. U.S. ex rel. Robinson v. Mancusi, 340 F.Supp. 662, 663 (W.D.N.Y. 1972); U.S. ex rel. Neal v. Wolfe, 346 F.Supp. 569, 574 (E.D.Pa. 1972).

** These rules and regulations were adopted subsequent to the events in Sostre. See Sostre v. McGinnis, supra, 442 F.2d at 199 n.5.

*** §251.6(f) provides:

> The provisions of this section shall not be construed so as to prohibit emergency action by the superintendent of the facility and, if necessary for the safety or security of the facility, all inmates or any segment of the inmates in a facility may, on the order of the person in charge of the facility, be confined in their cells or rooms for the duration of any period in which the safety or security of the facility is in jeopardy. In any such case the superintendent shall immediately notify the commissioner.

section, defendants were authorized to confine plaintiffs summarily, only "to their cells or rooms" and merely for the initial period of an emergency situation. U.S. ex rel. Walker v. Mancusi, 338 F.Supp. 311, 315 (W.D.N.Y. 1971), aff'd, 467 F.2d 51,52-53 (2d Cir. 1972). It is clear, however, that §251.6(f) did not grant defendants the authority to remove plaintiffs from their cells and to place them in special housing units, where they were subject to more punitive conditions for an extended period of time without a hearing.

Confinement to a special housing unit may only be ordered pursuant to §251.6(d), which requires application of the procedural rights provided in 7 N.Y.C.R.R. Chapter V, including an opportunity to be heard by the Adjustment Committee. See 7 N.Y.C.R.R. §§252.3(e) and 252(c). The district court found that none of these procedures were employed (10a),* thus highlighting the arbitrary nature of defendants' action.

(3)

As a matter of law, Judge Port's findings and conclusions, that circumstances at Clinton did not justify denying plaintiffs due process safeguards, were entirely proper. Under analogous circumstances, other courts have not hesitated to make similar determinations.

While it is true that courts have permitted prison authorities wide latitude in emergency situations, including

* According to defendant LaVallee, the Adjustment Committee and Superintendent's Committee were functioning after the general lockup and search had been completed on February 19, 1973. (Plaintiffs' Exhibit 3, PA 227-228).

the power to summarily confine or segregate inmates without a hearing, they have also imposed the concomitant requirement that due process safeguards must be made available at the earliest possible opportunity. Morris v. Travisano, 509 F.2d 1358, 1360 (1st Cir. 1975); LaBatt v. Twomey, 513 F.2d 641, 646 (7th Cir. 1975); Gomes v. Travisano, 490 F.2d 1209, 1215 (1st Cir. 1974); U.S. ex rel. Miller v. Twomey, 479 F.2d 701, 718 (7th Cir. 1973); Braxton v. Carlson, 483 F.2d 933, 937 (3rd Cir. 1973); U.S. ex rel. Walker v. Mancusi, 338 F.Supp. 311, 315 (W.D.N.Y. 1971), aff'd, 467 F.2d 51 (2d Cir. 1972).*

Courts have, thus, by necessity, made case by case determinations as to when alleged emergency situations no longer exist. For, as stated in Johnson v. Anderson, 370 F.Supp. 1373 (D.Del. 1974), at 1380, ". . .when the reason for the emergency exception to the hearing requirement is no longer apposite, the exception is no longer apposite".

Correctional officials have not been permitted to predicate the continued denial of due process protection on their own self-serving declarations that an emergency had not terminated.

> Emergencies. . .cease to be emergencies when they continue indefinitely and inmates cannot be confined to their cells indefinitely in

* Thus, in Morris v. Travisano, supra, although a prison remained understaffed, tense and in disrepair after a riot and other severe dislocations, the court found that order and safety had been sufficiently restored to allow for the provision of due process. And in Braxton v. Carlson, supra, the court determined that although a near mutiny had occurred in the prison only five days earlier, segregation of inmates could no longer be tolerated without hearings.

> alleged violation of their constitutional rights merely on the assertion that prison security requires it. Hoitt v. Vitek, 497 F.2d 598, 600 (1st Cir. 1974).

In fact, even when a genuine emergency is extended in time, courts have recognized that the requirement of due process protections becomes compelling. LaBatt v. Twomey, supra, 513 F.2d at 647 n.6.

Furthermore, the law is clear that the existence of an investigation does not eliminate the need for due process protection where, as in the instant case, inmates have been confined to segregation. At the minimum, plaintiffs were entitled to know the nature of the conduct which was being investigated and should have been afforded an opportunity to respond. See U.S. ex rel Robinson v. Mancusi, 340 F.Supp. 662, 663-664 (W.D.N.Y. 1972); U.S. ex rel. Walker v. Mancusi, supra, 338 F. Supp. at 315; Smoake v. Fritz, 320 F.Supp. 609, 612 (S.D.N.Y. 1970); Carter v. McGinnis, 320 F.Supp. 1092, 1096-97 (W.D.N.Y. 1970).*

* Indeed, defendants' own regulations required that an inmate segregated or keeplocked pending an investigation must have been informed of charges against him and must have been allowed to appear before the Adjustment Committee at least once a week. 7 N.Y.C.R.R. §252.3(d-f).

To allow otherwise would lead to the irrational and anomalous result that occurred in this case. Inmates against whom there was definite proof of misconduct received hearings and clear dispositions of the charges against them, while those merely suspected of misconduct, such as plaintiffs, received prolonged punishment in segregation without any of the safeguards of due process.

Judge Port's conclusion, that defendants could not arbitrarily terminate plaintiffs' due process rights, was a necessary exercise of judicial oversight. Judicial involvement in prison disciplinary matters has been motivated not only by a concern for the rights of the prisoner, but by an awareness of institutional interests as well. As Judge Coffin stated in Palmigiano v. Baxter, 487 F.2d 1280 (1st Cir. 1974) vacated, 408 U.S. 918 (1974),

> Time has proved. . .that blind deference to correctional officials does no real service to them. Judicial concern with procedural regularity has a direct bearing upon the maintenance of institutional order; the orderly care with which decisions are made by the prison authority is intimately related to the level of respect with which prisoners regard that authority. There is nothing more corrosive to the fabric of a public institution such as a prison than a feeling among those whom it contains that they are being treated unfairly. 487 F.2d at 1283.

POINT II

THE DISTRICT COURT PROPERLY HELD THAT THE DEFENDANTS, HAVING BEEN PERSONALLY AWARE OF THE DEPRIVATIONS SUFFERED BY PLAINTIFFS WITHOUT THE BENEFIT OF DUE PROCESS OF LAW AND HAVING PARTICIPATED IN THEIR UNCONSTITUTIONAL TREATMENT, WERE LIABLE TO PLAINTIFFS IN MONEY DAMAGES.

A. Personal Awareness and Participation

Judge Port found that defendants Oswald and LaVallee were informed and personally aware of the unconstitutional confinement of plaintiffs and personally participated in the denial of their constitutional rights (8a). Accordingly, he concluded that in order to redress their unconstitutional treatment, plaintiffs were entitled to recover compensatory damages* against defendants in the following amounts: $715.00 in favor of Mr. Gilliard; $748.25 in favor of Mr. Bloeth; and $740.00 in favor of Mr. Suggs (9a).** Judge Port's findings of fact and conclusions of law are fully supported by the record and are wholly consistent with the controlling case law.

The law is clear that in civil rights actions damages are recoverable against an individual for unjustifiable violations of constitutional rights under color of state law. Scheuer v. Rhodes, 416 U.S. 232 (1974); Monroe v. Pape, 365

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* Judge Port denied the award of punitive damages since he believed it would not serve a salutory purpose (8a).

** The court noted that "the damages alleged in this action. . . are refreshingly realistic" (3a-4a), and defendants have not challenged the amount of the award as being excessive.

U.S. 167 (1961); Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971). Within the specific context of prisons, federal courts have not hesitated to hold correctional officials liable for substantial compensatory damages where, as in the instant case, inmates have been unconstitutionally confined in segregation, experiencing physical and emotional suffering, as well as the loss of wages. See U.S. ex rel. Larkins v. Oswald, 510 F.2d 583 (2d Cir. 1975); Wright v. McMann, 460 F.2d 126 (2d Cir. 1972); Sostre v. McGinnis, supra; Johnson v. Anderson, ____ F.Supp. ____, 20 Crim. L. Rep. 2117 (D. Del. September 30, 1976); U.S. ex rel. Neal v. Wolfe, 346 F.Supp. 569 (E.D. Pa. 1972). See also U.S. ex rel. Tyrell v. Speaker, ____ F.2d ____ No. 75-1668 (3rd Cir. June 21, 1976); U.S. ex rel. Motley v. Rundle, 340 F.Supp. 807 (E.D. Pa. 1972).*

There can be no doubt that both Superintendent LaVallee and Commissioner Oswald had knowledge of plaintiffs' unconstitutional confinement and were sufficiently involved in their treatment to be personally liable.** The initial shutdown of the institution and confinement of the entire population was

* In U.S. ex rel. Larkins, supra, this Court affirmed a jury award of $1000 to an Attica inmate who had spent twelve days in segregation under conditions similar to those endured by plaintiffs in the instant case. The court particularly noted that Larkins, like the plaintiffs here, suffered severe anguish and anxiety by virtue of not knowing when his segregated confinement would end. 510 F.2d at 590. Accord, Wright v. McMann, 321 F.Supp. 127, 142 (N.D. N.Y. 1970), aff'd, 460 F.2d 126 (2d Cir. 1972).

** Defendants do not challenge the district court's findings as to the knowledge and involvement of defendant LaVallee.

ordered by defendant LaVallee after consulting with Commissioner Oswald's office (PA 185). Superintendent LaVallee later ordered plaintiffs' segregation and issued periodic status reports to Commissioner Oswald regarding their confinement (Defendants' Exhibits I and K, 30a-33a, 36a-38a). These reports, addressed to the Commissioner and Deputy Commissioner Quick, one of his closest aides, informed the Commissioner that normal activity had resumed at Clinton Correctional Facility;* nevertheless, plaintiffs and other inmates were being subjected to segregated confinement with no specific charges brought against them. No provision had been made for appearance before the Adjustment Committee or any other procedural safeguards, although required by the Constitution and defendants' own regulations, for which Commissioner Oswald had ultimate responsibility.

There was also evidence in the record that the Commissioner had personally been at Clinton and toured special housing Block E while the plaintiffs were confined there (PA 18,41). Moreover, the Commissioner sent Mr. Fish, counsel to the Department of Corrections, to Clinton to oversee the situation (PA 128 and Defendants' Exhibit J, 34a).

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* Both Mr. Quick's relationship to the Commissioner and defendants' own admission that Exhibit K was "updating the Commissioner" (PA 127), make it reasonable to conclude that the Commissioner had personal knowledge of the contents of Exhibit K. See Larkins v. Oswald, supra, 510 F.2d at 589; Landman v. Royster, 354 F.Supp. 1302, 1316 (E.D.Va. 1973); 7 N.Y.C.R.R. §3.10.

Finally, defendants' own regulations required that the Commissioner be notified of the confinement of inmates to cells and special housing units and of the conditions and deprivations imposed in such units. 7 N.Y.C.R.R. §§251.6(f), 302.2, 302.3. Indeed, in Larkins, supra, although there was no proof that the Commissioner had been informed of the segregation conditions of the petitioner, unlike the instant case, this Court nevertheless affirmed the finding of his personal liability because he was charged with having knowledge under similar corrections regulations.

These reporting provisions, combined with the Commissioner's personal visit to Clinton, the status reports, and the presence at Clinton, pursuant to the Commissioner's orders, of his closest assistants, provide unquestionable support for Judge Port's finding that defendant Oswald was informed and personally aware of the confinement conditions endured by plaintiffs, and was sufficiently involved in their unconstitutional treatment to be personally liable (8a). See Larkins v. Oswald, supra, 510 F.2d at 589; Wright v. McMann, 460 F.2d 126, 135 (2d Cir. 1972); Landman v. Royster, supra, 354 F.Supp. at 1316. See also, Mukmuk v. Commissioner of the Department of Correctional Services, 539 F.2d 272, 275 n.5 (2d Cir. 1976). Defendant Oswald did not testify at the trial and absolutely no evidence was offered to the contrary.

B. Violation of Clearly Established Rights

Defendants' contention that plaintiffs failed to allege or prove bad faith on the part of defendants is factually inaccurate, and, in any case, as a matter of law does not undermine the district court's finding of liability. Having proved that defendants were aware of and personally involved in plaintiffs' unconstitutional confinement, plaintiffs need not have shown that defendants acted with malice in order to recover compensatory damages. Wood v. Strickland, 420 U.S. 308 (1975); Landman v. Royster, supra. While proof that they acted in good faith would have entitled defendants to a qualified immunity, the burden of establishing that defense clearly rested on defendants. Scheuer v. Rhodes, 416 U.S. 232 (1974); Pierson v. Ray, 386 U.S. 547 (1967); U.S. ex rel. Tyrell v. Speaker, ____F.2d____, No. 75-1668 (3rd Cir. June 21, 1976); Mukmuk v. Commissioner, supra, 529 F.2d at 275; Landman v. Royster, supra, 354 F. Supp. at 1317.*

* Hoitt v. Vitek, 497 F.2d 598 (1st Cir. 1974), is not inconsistent, contrary to defendants' assertion. See Appellants' Brief at 29. There the court recognized that the concept of immunity is "thought of in connection with defenses which can be raised..." Id. at 601. Moreover, while Hoitt was merely dismissed on the pleadings, which did not raise the issue of good faith, the court there acknowledged that a complaint alleging facts similar to those alleged and proved by plaintiffs in this case would have stated a cause of action. Id. at 602.

However, neither Superintendent LaVallee nor Commissioner Oswald testified at the trial, offering evidence of their good faith. The evidence which was presented unquestionably foreclosed the possibility of an inference of good faith since defendants' conduct was in clear violation of plaintiffs' well-established rights and was purportedly based on a situation which defendants did not sincerely believe to have existed.

As set forth by the Supreme Court in Wood v. Strickland, supra,

> The official himself must be acting sincerely and with a belief that he is doing right, but an act violating. . .constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision. . .than by the presence of actual malice.
>
> . . . .
>
> [A state official] must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges. Such a standard neither imposes an unfair burden upon a person assuming a responsible public office requiring a high degree of intelligence and judgment for the proper fulfillment of its duties, nor an unwarranted burden in light of the value which civil rights have in our legal system. Any lesser standard would deny much of the promise of §1983. 420 U.S. at 321-22.

Accord, Mukmuk v. Commissioner, supra, 529 F.2d at 275; Wright v. McMann, supra, 460 F.2d at 135; Landman v. Royster, supra, 354 F.Supp. at 1317; Johnson v. Anderson, ____ F.Supp. ____, 20 Crim. L. Rep. 2117 (D. Del. September 30, 1976).

It is clear that defendants did not believe that their summary and prolonged confinement of plaintiffs was justified by an emergency. The district court's finding, that no emergency existed at Clinton from February 23, 1973 through late March, was fully supported by defendants' own admissions in the record that the facility was functioning normally at that time. See pp. 6-7,21-22, supra. Most significantly, defendant LaVallee denied the existence of an emergency at Clinton in prior sworn testimony.

Whether or not an emergency existed, plaintiffs' confinement to segregated housing units for approximately five weeks, without being presented with charges, an opportunity to be heard or information as to the reasons for and length of their confinement, was in gross disregard of a long line of precedent protecting the due process rights of prisoners. See pp. 17-19,24-27, supra.

Defendants' assertion, that at the time in question the law provided no guidelines for permissible conduct, is clearly false. This Court, on at least two occasions prior to the precipitating circumstances in this case, had enunciated standards for the provision of procedural safeguards when confining inmates to segregation. See Sostre v. McGinnis, supra; Wright v. McMann, supra. While ignorance of settled law is no defense, Sostre, an en banc decision of this Court,

was of such significance and renown that it is simply implausible that the Commissioner of Corrections and Superintendent of a prison were unaware of it.

Moreover, in the specific context of prison emergencies, it had been well-established that due process safeguards were required. U.S. ex rel. Walker v. Mancusi, 338 F.Supp. 311, 317-18 (W.D.N.Y. 1971), aff'd, 467 F.2d 51 (2d Cir. 1972). See also, U.S. ex rel. Robinson v. Mancusi, 340 F.Supp. 662 (W.D.N.Y. 1972); Smoake v. Fritz, 320 F.Supp. 609 (S.D.N.Y. 1970); Carter v. McGinnis, 320 F.Supp. 1092 (W.D.N.Y. 1970). Finally, to expect defendants to have been aware of their own regulations, providing guidelines which were also violated, can hardly be considered an unfair burden.

Thus, there is no question that defendants violated what were, in this Circuit, clearly established rights. For defendants to have ignored the clear mandate of the case law and their own regulations was to act at their own peril. Accordingly, their assertion of good faith must fail.

CONCLUSION

FOR THE ABOVE-STATED REASONS, THE JUDGMENT OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Respectfully submitted,

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Dated: December 1, 1976

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -X

RAYMOND GILLIARD, FRANCIS BLOETH and JOHN SUGGS,

Plaintiffs-Appellees,

-against-

RUSSELL G. OSWALD, Commissioner of Correctional Services and J. EDWIN LaVALLEE, Superintendent of Clinton Correctional Facility,

Defendants-Appellants.

- -X

AFFIDAVIT OF SERVICE

No. 76-2109

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

THEODORE H. KATZ, being duly sworn, deposes and says that on December 1, 1976, by first class mail, postage prepaid, I caused to be deposited in the United States mail a true and correct copy of the brief and appendix of plaintiffs-appellees in this action, addressed to:

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Theodore Katz
THEODORE H. KATZ
Attorney for Plaintiffs-Appellees

Sworn to before me this
1st day of December, 1976.

Ellen J. Winner
Notary Public

ELLEN J. WINNER
NOTARY PUBLIC, State of New York
No. 4607108
Qualified in New York County
Commission Expires March 30, 1977